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By. of Filmore & Miller for

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1899.

No. 649

Filed May 14, 1900.

THE CITY OF NEW ORLEANS, A MUNICIPAL CORPORATION, PETITIONER,

vs.

ANN WARNER, JOANNA McCROSSIN, MARY E. WARNER AND HARRY WARNER, LEGAL HEIRS OF JOHN G. WARNER; JOHN CROSSLEY'S SONS, THE SUFFOLK NATIONAL BANK, FRANCIS JAMES GASQUET, WILDER & COMPANY; MRS. FRANK N. BUTLER, IN HER INDIVIDUAL CAPACITY AS WIDOW IN COMMUNITY AND AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF FRANK N. BUTLER, HER DECEASED HUSBAND; MRS. MARY E. TALIAFERO, JOHN J. DONALDSON, AND MRS. ELIZA J. LYTLE, DATIVE TUTRIX, RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

SAMUEL L. GILMORE,
City Attorney.

BRANCH K. MILLER,
Solicitors for Petitioner.

May, 1900.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The various assignments of error relied upon by petitioner present, in varying forms, the following propositions:

First—That Act No. 16 of 1876 authorized the issuance of drainage warrants for two purposes alone, namely:

The purchase of (a), the corporate franchises of the Mississippi & Mexican Gulf Ship Canal Company from the latter, and its transferee, and (b), the dredge boats, derricks, etc., which had been used by them in prosecuting the work of drainage.

Second—That it was for these purposes only, except as to an amount of twenty thousand dollars, that drainage warrants were issued, under the contract of sale which was made under the authority of this statute.

Third—There was no authority given by the Act of 1876 to issue any warrants in compromise or settlement of the claim for damages, exploited by the company and its transferee, against the City of New Orleans.

Fourth—That the company's franchise, considered as a thing of value to the city, for which any warrants were or may have been issued, must be regarded as a fiction, and its acceptance by the city was the assumption of an onerous burden, and in no real sense the acquisition of property; that on this account it should not be weighed as part of the consideration of any warrants issued; that in any event it could form no part of the contract, because there was an entire omission to observe the condition precedent for a valid contract, prescribed by Sec. 2 of the Act of 1876, to the effect that there should be a previous appraisement of the rights and things which the city was to purchase or settle for, should she deem it advisable to make any contract under the statute.

Fifth—That twenty thousand dollars of the warrants actually issued under the contract of purchase, to reimburse, by way of compromise, an amount of drainage taxes collected prior to 1876, and diverted by the city to purposes other than the payment of drainage warrants, were issued without any authority of law, and hence should not be admitted on the same footing as warrants issued in payment of the price paid for the purchase of property to

which class of warrants alone the benefits of the previous decrees of this court in the present case extend.

Sixth—That none of the questions raised by petitioner in the Circuit Court and in the Court of Appeals for the Fifth Circuit, have ever been decided adversely to petitioner in this court, nor, in fact, decided at all.

The above statement sets out the logical order in which the points insisted upon by petitioner, arise, and having thus briefly brought them to the notice of the court, it is deemed best to consider, first, whether or not this court has already considered and refused to maintain them; this brings us to the first ground assigned as error in the decree in the Court of Appeals, which is the following:

First—That the grounds of exception to the master's report filed by petitioner in the Circuit Court, and the issues raised by such exceptions, had not been decided adversely to the city of New Orleans, or foreclosed against her, in Warner vs. New Orleans, 167 U. S., p. 467, and New Orleans vs. Warner, 175 U. S., p. 120, and that the Court of Appeals erred in holding the reverse: that, on the contrary, no such questions were raised, much less decided, in the case first mentioned, and that in the cause secondly mentioned, although some of the issues presented by said exceptions, were urged upon the Court, the latter, by its opinion, expressly declined to consider them; and, further, the precise issues presented herein were not made, much less passed upon, by the Supreme Court, in the case secondly mentioned.

The question here raised, namely, whether or not any decree can be entered against the city for more than $153,750, the appraisement of the dredge boats, has never been passed upon by this Court, or Court of Appeals; on the contrary, the opinion of the former in 167 U. S., pp. 467 et seq., in answer to a certified question, and that found in 175 U. S. 120, upon the certiorari obtained by the city, both distinctly negative the contention that on

either occasion anything was said, which declared that *all* warrants issued under the contract of 1876, stood upon the same footing as the particular warrants held by complainant; the first opinion contained many *dicta* which show that the Court, in speaking, had distinctly in view the contract of 1876 only as a *sale of property*, and in no part a *settlement of a claim for damages;* the opinion secondly mentioned, distinctly declines to enter upon any inquiry to ascertain, whether there was any difference between the amount of warrants issued as the price of the tangible property, and those issued in settlement of the claim for damages.

The case in 167 U. S. consists of the Court's answer to one of two certified questions, the second of which it declined to answer. It will be seen from the opinion, that the Court declined to consider the case outside of the certificate of the Court of Appeals, stating the facts as to which instructions were sought; your Honors declined to consider the whole case presented by the record, but confined your examination to the distinct questions of law certified. (See pp. 474, 475.)

The statement of the Court of Appeals, upon which the questions were certified, set forth the facts upon which the Supreme Court's opinion was sought; that Court confined itself to the facts appearing in the statement, and paid no regard to any others, for it says, (p. 475), "for these facts we look simply to the statement prepared by the Court of Appeals, and not to the bill and exhibits, copies of which it ordered to be sent to this Court."

The statement of the Court of Appeals touching the act of 1876, is as follows: It "was passed for the purpose of authorizing the city of New Orleans to assume exclusive control of all drainage work, and if she desired it, or deemed it advisable, to *purchase* from said Canal Company and the transferee Van Norden, *all the tools, boats, and apparatus pertaining to drainage work, and the fran-*

chise of the company, upon an appraisement to be made by appraiser, sto be appointed by the City Council.

"The act further provided, that the *price* should be paid by the city of New Orleans in drainage warrants, in the same form and manner as those theretofore issued under Act 30 of 1871," p. 470.

Having thus described what was authorized by the act, the statement of the Court of Appeals then sets out the contract made under it, which it described in these words; (p. 470): "The valuation was fixed at $300,000, and on the 7th of June, 1876, *a formal act of sale and transfer* was executed between Warner Van Norden and the city of New Orleans, by which the former made a *transfer* of the drainage plant and franchise for said amount" (p. 470).

The warrants which were the subject matter of the suit are adverted to in the following language:

"Complainant sues on three of the drainage warrants of two thousand dollars each, given for the *purchase price of the drainage plant and franchise sold* to the city of New Orleans, as above set forth," p. 471.

Again, an page 471, in setting out an abbreviated statement of the averments of the bill the Court of Appeals declares, "That the city had never claimed, prior to the *purchase of said property and franchise*, that the issuance of the said bonds, etc. * * * And again, that "the Act of 1876 was an authority for the city to make said *purchase* as well as a legislative recognition," etc.; * * * again on page 472, "(6) that the contract of *sale* was entered into by Van Norden in consideration of the provisions of said act of 1876, and its effects on his rights and remedies; that neither at the time of entering into the *contract of sale*, nor when the warrants were delivered in discharge," etc. (p. 472).

And again in the statement of the first question propounded, the only one which this Court answered,

the contract of June 7, 1876, is declared to be a *sale*, and not a *transaction or compromise*, to-wit:

"First—Is the city of New Orleans, under the warranty, express and implied, contained in the *contract of sale* of June 7, 1876, by which she *acquired* the property and franchise from Warner Van Norden," etc.; p. 473.

Turning to the opinion itself, it is clear that this Court had in mind, as the foundation of the superiority awarded the "purchase" warrants, over the "work" warrants, the scope of the act of 1876, as to which the following is affirmed; (See bottom p. 475):

"An act was passed authorizing the city of New Orleans to assume exclusive control of the drainage work, and, if it desired, to *purchase* from the canal company and its transferee all the boats, tools, and apparatus pertaining to the work, and also the franchise of the company."

And on page 476, the Court says: "The city elected to make the *purchase of the property* of the canal company and its transferee."

And again, on the same page: "Now, after the city had assumed exclusive control of the work, after it had voluntarily *purchased from the canal company and its transferee, their property*, and had given these warrants, payable out of the drainage fund, it sold some of the drainage machinery, suffered the rest to become rotten and valueless, and abandoned the work of drainage."

On page 477, "the city, in respect of the *purchase of this property* from the canal company and its transferee, and in the obligations assumed by the warrants issued, acted voluntarily."

* * * * * *

"The proposition we affirm is, that *one who purchases property*, contracting to pay for it out of a particular fund, and issues warrants therefore, payable out of that fund * * * * * *

can not deliberately abandon that duty, take active steps to prevent the further creation of the fund, and then, there being nothing in the fund, plead, in defense to a liability on the warrants drawn on that fund, that it had, prior to the *purchase*, paid off obligations theretofore created against the fund."

This is followed by language which again speaks of the contract as a *purchase*, and the property as that which the city "voluntarily purchased."

So far as the thoughts in the Court's mind, which it purposed to express in its opinion, may be ascertained from the language used, there is overwhelming evidence that all that it affirmed, was exclusively confined and had sole reference to the contract, considered as one of purchase, and that it was in no respect regarded as a settlement, transaction or compromise of claims or demands for violation of the contract of 1871 by the city; it appears conclusively, not only that the legislative contract resulting from Act No. 30 of 1871 was not in the slightest degree in contemplation, but no single part of it; still less any right to, or action for, damages consequent to or grow-out of its violation; this is true not only as regards the opinion of this Court, but also the facts stated in the certificate of the Court of Appeals, from which arose the questions of law submitted, and in the first question itself, thoughout both of which, the contract concerned was declared to be one of the sale of property.

Therefore, to attribute either the Court of Appeals, in seeking the instructions of this Court, or to the latter, in giving the instructions asked for, any intention to place warrants issued in settlement of a claim for damages any footing of superiority, is to ascribe to both a purpose which is denied by everything which has been said by either; they meant to do nothing more than to declare, that so far as the contract of 1876 was a sale of property, the price thereof was sacred, and beyond assault in the mode

there attempted by the city; to charge them with having declared that the settlement of the damages claimed was of equal sanctity, is to put into their mouths what they have never spoken; and the relative dignity of the two claims, that for the price of property sold and delivered, and that for damages, are separated by so wide a difference as to make it impossible that the two should be placed upon the same footing; as to the property, the city had received value, and she was not permitted to destroy the consideration she undertook to give for it; in regard to the claim for damages, she had received nothing, and it was a mere claim for supposed indemnity, to which the Act of 1876 added nothing, and on account of which, she had received nothing which she did not have before.

In the case found in 175 U. S., it was argued on pages 1 to 3, inclusive, of petitioner's brief here, that the franchises were of no value, and in their acquisition the city got possession of no real asset, as in the case of boats, but in reality undertook a burden and assumed an obligation, for which it received no consideration; that the possession of the franchise only enabled it to do at an expense to itself, the work which the company, under the act of 1871, had the exclusive right to do, and for which it was entitled to charge fifty cents per square yard for canal digging, and fifty cents per square yard for levee building; this work, for which the company was to receive so high a compensation, the city was to do with its own funds or out of the drainage tax collections, which had never then, and have not now been made, which besides were to be used in paying off the warrants; the inequality and unfairness of the contract were pressed upon the court, and its attention directed to the fact that the claim for damages did not enter into the total sum of $300,000, since the act of sale made no mention of it as part of the consideration, and it may be here added there had been no appraisement of it, although Section 2 of the act of 1876 directed that

the contract be preceded by an appraisement of everything that was to be embraced in the agreement.

But the Court did not pass upon this phase of the matter; on the contrary, it expressly declined to give it consideration, as will appear in the sixth paragraph or section of its opinion, in the following language:

"It is scarcely necessary to say, that the fact that the city chose to pay $300,000 in 1876, for property which Van Norden bought in 1872 from the ship canal company for $50,000, is not one which can be considered here." (157 U. S. 145.)

A more positive statement that the Court not only would decide nothing as to the issue, but further, that it would give it no consideration at all, could not be expressed in language; therefore it is to no purpose that we are told that the contention now made has been passed upon adversely to the city. It has not been passed upon at all; so far as concerns any adjudication upon it, it stands now as it did before this argument was made in this Court when the case was last before it.

After thus declining to consider the question at all, and in so doing it can not be deemed that the Court designed deciding that it was either unfounded or unsustainable, the Court proceeds to declare that the appraisement of the boats and machinery was only $153,750, and that no appraisement at all was made of the damages; but that it must be borne in mind that the consideration of $300,000 was fixed, to cover not only the property, but the exclusive franchise under the act of 1871, and the claims for damages against the city; but it was evidently not intended to decide the question which the Court was at pains in unmistakable language, to declare that it would not consider.

These remarks, however, are only preliminary to the only dictum it intended to pronounce—namely, that the motives of the council in making the contract, could not be inquired into, nor could it be shown that they acted

upon improper consideration; it may be said that the Court did decide this, but it is not only not the question which is here raised, but is not even akin to it in any aspect; the city is not here seeking to show that the contract was dishonest, or that the officials in making it were corrupted; so far from attacking the contract on these lines, the city relies upon its terms to show, that apart from the motive of any person concerned in it, it was in excess of the legislative authority under which it was made, that this appears upon its face, and to the extent to which it exceeds the power given the city by the act of 1876, it must be restrained; again, it is evident that this Court, in its decision in 167, U. S., and the Court of Appeals, have so considered the contract and deal with it, as one for the sale of the dredge boats and machinery alone, and it is only in this aspect that the warrant issueds under it, are entitled to the benefits of the decree rendered in this case.

It would seem strange, indeed, if, every time these two Courts had occasion to mention the contract, it is described as one for the sale of property, and that it is never spoken of as anything else, if as a matter of fact, it was not only this, but also a transaction, compromise and settlement of a claim for damages, about which the parties were not in agreement, of which the city surveyor made no appraisement, as was required by the act of 1876, as a condition precedent, and the validity and extent of which claim, was evidently in dispute between the parties.

It will be noted, that throughout the last decision of this Court, the contract, whenever spoken of, is styled a *purchase;* in the first paragraph or section of the opinion it is said, 175 U. S., p. 129, that in respect to the *purchase*, the city acted voluntarily; that it *paid for the property* in warrants drawn upon a particular fund; that this latter it could not prevent being made good, and then require the *vendor* to look to the fund, and not to itself; in speaking

of Jackson's warrants, in the second section, it said that they "were part of those given in payment of the *purchase price* of the drainage plant," p. 132; also, that complainant based his suit upon $6000 of warrants given for the *purchase of the drainage plant*, p. 133; that in reference to these warrants, it had been held, in 167 U. S., that the city could not, when *purchasing property*, and contracting to pay for it out of a particular fund, abandon its duty, take steps to prevent the further creation of the fund, and plead, in defense to a liability on the warrants, that it had, prior to the *purchase*, paid off obligations created against the fund, p. 134; in the third paragraph it is said, that from the date of the *purchase*, the city ceased all work, and sold some of the boats and machinery *purchased*, etc., p. 134; the third paragraph also quotes from 167 U. S., the language that one who *purchases property*, etc.; again, that prior to the *purchase* of the Ship Canal Company's plant from Van Norden, etc,; also, when the city *purchased* the drainage plant, it seems to have been in good condition, etc.

The decree in this case in favor of Warner, is not a decree in favor of any other holder of warrants; this is assumed by the order of reference, which directs a master to give notice to all other holders of warrants to appear before him and establish their claims (see record, sent up from the Court below, p. 3); the establishment of the claims necessarily involves an inquiry into their status; the defendant can oppose their allowance upon any available ground, based upon either law or fact; their right to share in the fund is open to contest.

The drainage fund, by the second paragraph of the decree, is declared to be a trust fund for the purpose of paying the claims of complainant and other holders of the same class of warrants, issued under the act of sale from Van Norden to the city, under the authority of Act 16 of 1876; that Warner's warrants are entitled to be paid out of

this fund is now beyond question, but the same right, as sought to be availed of by intervenors, is open to question; their warrants may be shown not to be warrants entitled to payment, either under the statute or under the act of sale.

The decisions in this case, in 167 U. S. and 175 U. S., were made only with reference to the three warrants held by Warner; the others were not before the court, and hence whether or not they were entitled to the benefits of the decree was to be determined by subsequent proceedings before the Master.

The decree in favor of Warner, is not a decree to which all of the parties appearing to prove their claims before the Master, simply on the production of warrants of the same class of those upon which the defendant has been decreed to be Warner's debtor, are entitled to benefit by; the warrants of the intervenors may be contested, as entitled to any share in the fund established, upon any ground whatsoever; the burden of establishing their claims must be discharged, before they can benefit by the decree; and against the effort to show that they are payable out of the fund, any defense, founded either upon law or fact, may be urged; this proposition is established by unquestionable authority.

"It may be observed, that where a person, not a party to the suit, carries in a claim before the Master, under the decree, the party representing the estate out of which the claim is made, has a right to the benefit of any defense which he could have made, if a bill had been filed by the claimant in Equity, or an action had been brought to establish such claim." 2nd Daniel's Chancery Pleading and Practice, 5th Edition, top paging 1211, bottom paging 1157.

"Where a person not a party to the suit carries in a claim (before the Master), the party representing the estate upon which the claim is made, may make any de-

fense which he could have made, to a bill filed by the claimant, or to an action at law brought to establish such claim." 2d Barbour's Chancery Practice, top paging 523, bottom paging 72.

The decree in favor of complainant, Warner, is in no respect a decree in favor of each of the interventors, who have appeared before the Master to prove up their claims, except so far as the subject matter of the defense set up as to the first, is identical with that set up, as to the second. The decree in favor of complainant can be a protection of the intervenors only so far as the grounds formerly set up are concerned. It forms no estoppel as against any defense to the warrants of the intervenors, which was not set up and passed upon as between complainant and defendant.

Thus, in Cromwell vs. County of Sac, 94 U. S., 351, a judgment decreeing that certain county bonds were void, in the hands of parties who did not acquire them before maturity for value, did not estop the plaintiff holding other bonds of the same series, which, in the second action, he showed that he had acquired for value before maturity, because the second action presented no issue which had been determined in the first.

Where the second action between the parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue, or points controverted, upon the determination of which the finding or verdict was rendered. In all cases where it is sought to be applied, the estoppel of a judgment rendered upon one cause of action, to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question *actually* litigated or determined in the original action, *not* what *might have been* thus litigated or determined. Only upon such matters is the judgment conclusive in another action.

Fessenden vs. Barrett, 50 Fed. Rep., p. 692.

A judgment that bonds were illegal and void, does not bar a subsequent suit upon coupons of the same bonds, and does not operate as an estoppel, except as to the particular matters at issue, or points controverted in the first suit.

Geneva National Bank vs. Independent School District of Riverside, 25 Fed. Rep., p. 629.

To the same effect is Nesbitt vs. same defendant, 25 Fed. Rep., p. 635.

A judgment for defendant in an action for the recovery of instalments of interest on certain bonds, asto a suit for the recovery of subsequent interest upon the same bonds, is an estoppel to the second suit, only as to the matters at issue, or points controverted in the first suit.

Smith vs. Town of Ontario, 4 Fed. Rep. (p. 386).

Although the rule announced in the cited authorities is applied in cases arising between the original plaintiff and the original defendant, it is equally applicable to a subsequent cause, in which other parties claim against the defendant the benefits of the decree obtained by the original plaintiff; surely a judgment can not have any greater effect between a person not originally a party to it, but who seeks to avail himself of its benefit, than it could have in favor of the party who obtained it.

The points now made against the allowance of the demands of the several claimants who appeared before the Master, nowhere appear in the pleadings of the original litigation; they were never at any time set up as defenses, save partly in the oral argument and brief of defendant in the case reported in 175 U. S. Rep.; as has been seen, so far from having been adjudicated upon adversely to defendant, the Court declined, to even give them consideration; therefore, there is no warrant for the claim that defendant has been concluded upon the issues now raised; they are still open and at large as regards defendant, and furnish proper and legitimate grounds upon which the third parties

claimant should be denied participation in the fund which has been established.

But admitting, for the sake of argument, that the first decree, in favor of Warner alone, did bind defendant to the validity of any and all warrants issued under the act of purchase of 1876, the third parties now before the Court are claiming the advantages of that decree, and seek the process of the Court for its enforcement in their favor.

It is a well established rule, that where a party who has obtained a decree returns to the court of chancery, to obtain its aid in executing the former decree, it is at the risk of the opening of such decree, as respects the relief to be granted on the new bill, and if the Court be of the opinion that it was erroneous, it may refuse to execute it.

Thus, in Gay vs. Parpart, 106 U. S. 679, it was held, that where a decree erroneously declared the nature of the estate of each codefendant, and shortly afterwards deeds between the parties were made, which did not follow the decree, and where subsequently a bill in chancery was brought to perfect the partition, by compelling conveyances in accordance with the decree, the court might inquire into the equities of the parties, arising out of the surrounding circumstances, and refuse to order conveyances in accord with the title, as found by the former decree, when it would be inequitable to make such order.

The court in concluding its opinion, quoted with approval the following citition from the Supreme Court of Illinois, in Wadhams vs. Gay, 73 Ill. 415, as follows:

"Upon an appeal to equity, by original bill, to lends its assistance for carrying it into execution, because of an omission in the decree, and providing no means for its execution, it would seem reasonable that the same rule of the court's action would obtain as in case of any solemn agreement under seal, and where there are manifest the elements of injustice, mistake, surprise, apprehension,

and want of consideration, to remain passive. (See p. 699.)

"Where a party returns to a court of chancery, to obtain its aid in executing a former decree, it is at the risk of opening such decree, as respects the relief to be granted on the new bill; hence, even if it be assumed, upon the evidence, that the decree against the old corporation bound the new one, and this being in effect, in which it is framed, a bill to carry the former consent decree into execution, the Circuit Court was not obliged to do so, if it believed the decree was erroneous, and that it was erroneous we have already decided. Inasmuch as plaintiffs came into a court of equity, to have the benefit of the former decree, the court was at liberty to inquire whether circumstances justified the relief. Mitford's Chancery Pleadings, 96. Indeed, it would seem to have devolved upon it to show that the decree was a right decree."

"Upon all the facts shown in this case, the court could not originally have made a decree like this one, limiting to Charles a life estate, and declaring a remainder over in fee simple to his children after him. There is authority for the doctrine that the Court may, on a bill to carry a decree into execution, look into the case, to see if it would make the same decree a second time; in such a case it is said: in respect to the special application, to examine the decree, and it it be unjust, to refuse enforcement (Adams Equity, 416; Wadhams vs. Gay, 73 Ill., p. 430).

"Daniell in 2 Dan., Ch. 1614, citing Lawrence vs. Berney, 2 Ch. Rep., on this point says: "It is laid down, that although where a decree is capable of being executed by the ordinary process and forms of the Court, whatever the iniquity of the decree may be, yet, till it is reversed, the Court is bound to assist it with the utmost process the course of the Court will bear. But where the common process of the Court will not serve, and things come to be

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in such a state and condition, after a decree made, that it requires an original bill, and a second decree upon that, before the first decree can be executed—if the first decree is unjust—then this Court desires to be excused in making it its own act, and to build upon said foundations, and charging its own conscience with promoting an apparent injustice; and this obliges the Court to examine the grounds of the first decree, before it makes the same decree again."

"In the case of O'Connel vs. McNamara, 3 Dr. & Warren, 411, Lord Chancellor Sugden said: 'I do not understand the rule to be, that this Court is bound to carry into execution an erroneous decree. On the contrary, I apprehend that when a party comes into this Court asking for the benefit of a former decree, he must be prepared to show, if the case requires it, that such decree was right,' and to like effect Hamilton vs. Houghton, 2 Blight P. C., 169; Bean vs. Smith, 2 Mason, 252."

"There are, it is admitted, authorities the other way on this subject. Story in his Eq. Pl. 430, in speaking upon it, says: 'And the court has even, on circumstances, refused to enforce the decree, although, in other cases the court and the House of Lords, upon an appeal, seem to have considered that the decree ought to be examined on a bill to carry it into execution,' and so Mitf. Ch. Pl. 96. And although it is insisted by appellee that the authorities cited are totally inapplicable to such a case as the present, we are willing to accept the principle declared as pertinent to the case of a bill seeking the particular description of relief as in this case." Wadhams vs. Gay, 73 Ill., 430.

See, also, Lawrenceburg Co. vs. Janesville Mills, 138 U. S. 56.

If the cited cases sufficiently fix the rule that this Court may examine its former decree, for the purpose of re-

stricting its application and effect, to a class of warrants which does not include those of the third parties before the court, there can be no doubt that it is the plain duty of the court to do so: aside from the particular declarations or recitals in the prior opinions there would seem to be nothing plainer than, that what the Court intended to do, was to give only the warrants issued in payment of the price of the dredge boat, etc., a right of payment; it was not the purpose of the court to do anything more; such appears throughout as the fundamental idea, which the decree of the court carried out; therefore, if upon examination, your Honors should be satisfied, that in allowing the claims of the parties appearing before the Master, is giving to your decree an operation and effect which you did not contemplate, or which you would not now order, if the matter were before you for the first time, it is not only within the power, but it is the duty of the court, to exclude from payment the warrants of the third parties who claim the benefit of the decree in favor of Warner.

The second and third assignments are these:

Second—That the principle declared by the two said cases was that the drainage warrants in question here, so far as issued in payment of the price of property, were obligations of the city of New Orleans; that the Supreme Court did not decide, in either of said cases, that warrants issued in settlement of, or attributable to, the payment of any claim for damages held by the Mississippi & Mexican Gulf Ship Canal Company or Warner Van Norden against the city of New Orleans, were obligations of the latter, or entitled to the same rights and privileges as warrants issued in payment of the price of property; that the Court of Appeals for the Fifth Circuit erred in not so holding, and also in holding as it did.

Third—That no warrants should be considered as having been issued in payment of the price of the fran-

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chise of the said company, as the same was of no value to the city of New Orleans, and its acquisition by the latter gave it nothing of any value, but was, on the contrary, the assumption by it of an onerous burden, to wit: the completion of the drainage work at its own expense, for which work the company and Van Norden were entitled to charge fifty cents per square yard each for canal excavation and levee building, which charges, however, they had never been able to collect, except in an insignificant amount, thus throwing upon the company and Van Norden the loss of many hundreds of thousands of dollars; thus relieving them of a burdensome and unprofitable duty; and the Court of Appeals erred in holding that the contrary was held by the Supreme Court, that the said franchise was to be considered, as in part, a consideration for any of said warrants.

The theory of your Honors' decision found in 167 U. S., 467, is understood to be, that the city having *purchased property*, contracting to pay for it out of a particular fund, and issued warrants therefor payable out of that fund —a fund yet partially to be created, and created by the performance by the city of a statutory duty, could not deliberately abandon that duty, take active steps to prevent the further creation of the fund, and then, there being nothing in the fund, plead, in defense to a liability on the warrants drawn on that fund, that it had, prior to the purchase, paid off obligations theretofore created against the fund; that the city could not draw warrants on the fund in payment of *property* which it voluntarily *purchased*—and then abandon the work by which alone the fund could be made good, resort to means within its power to prevent any payment of assessments into that fund, and thus, after violating its contract promise not to obstruct or impede, but, on the contrary, to facilitate by all lawful means the collection of assessments, plead its prior issue of bonds as a reason for evading any liability upon the warrants; that

one who *purchases property*, and pays for it in warrants drawn upon a particular fund, the creation of which depends largely upon his own action, is under an implied obligation to do whatever is reasonable and fair to make that fund good.

If this be a correct interpretation of the Court's position, its conclusions were largely, if not entirely influenced by the consideration, that the city had received property from the Canal Company and its transferee, giving warrants on the drainage fund for the payment of its price, which payment it sought to defeat, although retaining possession of the property purchased, and which had been parted with by the vendors. The city's possession was like unto that of a person, who had obtained possession of the property of another for an agreed consideration, which he afterwards sought to destroy. The vendors had given up their property, and thus deprived themselves of all benefit of its use and enjoyment, which had passed to the city. Under these conditions the view of the Court was, that it would be an act of bad faith to permit the city to escape liability, for what it had promised to pay as a consideration, for the property it had received. If, as is stated, this be a correct view of the Court's opinion, it could have no application to such warrants as were issued in settlement of the claim for damages, or to the twenty thousand dollars of warrants in reimbursement of an amount of drainage taxes which had been diverted; this is specially so as to the latter, because the diversion in question occurred prior to the city's purchase, before any warrants issued under the sale of 1876 had come into existence, and the diverted funds, if properly applied, would have gone to settle a corresponding amount of warrants which had been issued to the Canal Company and its transferee for work which they had done, and for these warrants the Court, in Peake vs. New Orleans, 139 U. S. 342 et seq., decided that the city was not liable;

the process, therefore, of thus making good any diversion of taxes collected prior to 1876, would be to substitute so many purchase warrants, for so many work warrants.

It is true, as has been observed by the Court, in 175 U. S. 145, that the consideration of three hundred thousand dollars was fixed upon, not only to cover the value of the property of the plant, but the exclusive franchise under the act of 1871; the franchise, however, was nothing for which any sum of money could be fairly asked, or to which, in reason and conscience, any part of the price could be attributed; we learn from Peake vs. New Orleans, 139 U. S. 347, that from January 1, 1875, the cost of the work performed by the Canal Company and its transferee was $1,713,635.35, and that during that period the city had issued drainage warrants in payment of the same, to the amount of $1,422,263.69, and the drainage assessments being an insufficient source for the retirement of these, they were taken up by an issue of bonds; this shows the value at that time of the company's franchise, with the payment of its warrants restricted to the mode provided by its contract; the warrants were paid only by the additional and outside aid, supplied by the city's bond issue (see 139 U. S. 358); nor did the franchise, as a piece of property, improve in value up to the time of the city's purchase, as is shown by many hundreds of thousands of dollars of unpaid warrants issued for work done by the company and its transferee, the payment of which was sought to be enforced in the Peake case.

It would appear from this, that so far as concerns the franchise, that Van Norden and the company had parted with nothing which it was desirable for them to keep; their exercise of the franchise had resulted in serious, in fact, tremendous losses, diminished to an appreciable extent, only by the voluntary act of the Sate and city, the first in authorizing, and the second

in issuing, over a million and a half dollars of bonds, for the purpose of relieving the owners of the franchise of the disastrous results of its possession; the purchase of the corporate franchise by the city, was no more of a blessing than its enjoyment by its former owners; the municipality acquired the privilege of completing the drainage work, which was before the exclusive property of the company, with all its attendant advantages, to which attention has been called; the company did have the right, under the act of 1871, to charge fifty cents per square yard for excavating canals, and fifty cents per square yard for building levees; the city, for the work it undertook to do, enjoyed no such right; it is true, the concluding clause of section 4 of the act of 1876 gave the city the power to let out the work by contract to the lowest bidder, but in view of the experience of Van Norden and the company in relation to the same work, the result of such an attempt is not difficult to divine, especially so as the option was also given the city to pay the contractor out of the assessments upon the property, their availibility for such purposes, being likewise fully demonstrated by the events occurring between 1871 and 1876; the section concludes with the gracious provision of an option to the city, also to pay for the work out of its treasury, which may be considered all that was really intended to be provided in the way of funds for the doing of the work; it is therefore fair to say, that the completion of the drainage system was really intended to be accomplished, with funds derived from the city's general revenue, and for this it is not reasonable to suppose that she would be required to pay, either in drainage warrants given to the company and Van Norden, or otherwise; in disposing of its franchise the company got rid of a ruinous contract; in acquiring it the city exchanged places with its vendors, and in reality assumed a burden which had been too heavy for Van Norden and

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the company to bear; therefore, in reason and in conscience, no serious consideration can be given to the franchise, as a thing for which the city was intended, or can be supposed to have been required, to pay anything.

The fourth assignment, concerns the gratuitous introduction of the reimbursement of certain drainage taxes claimed to have been diverted prior to the purchase by the city, stated as follows:

Fourth—That the item of twenty thousand dollars of drainage warrants, issued in settlement of the amount of drainage taxes said to have been diverted or used by the city of New Orleans, for purposes other than the retirement of drainage warrants, prior to June 7, 1876, the date of the city's purchase, was in reality entirely beyond the authority given the city by act No. 16 of 1876, and the substitution of so many socalled "purchase" warrants for a corresponding amount of warrants issued to Van Norden and the said company in payment for work done, which latter class of warrants it was decreed that the city could be compelled to pay, in the case of J. W. Peake vs. City of New Orleans, No. 852 of the docket of this Court of the October Term of 1890.

The matter here adverted to, is found in the following clause of the act of sale of the Canal Company and Van Norden to the city, of June 7th, 1876, appearing on page 102 of the record of this court, No. 640, New Orleans vs. Warner, October Term, 1898:

"In as much as it has been claimed that certain collections of drainage funds have been applied by the previous administrators to general fund purposes, the said city of New Orleans will issue to the said W. Van Norden the sum of twenty thousand dollars of drainage warrants, in full satisfaction of the same."

The collections which were thus diverted, if properly applied, would have gone to the retirement of a corresponding amount of warrants issued to Van Norden and

the company for work done, as the diversion occurred while they were still in possession of their franchise and contract; the only loss suffered was the nonpayment of as many "work" warrants, as the diverted taxes would have taken up; therefore, to place the misappropriated sum in the form of "purchase" warrants issued under the act of 1876, would in effect place so many warrants of the precise character of those involved in the Peake case, for which this court held that the city was not liable, upon the same footing as warrants of the character involved in the present case, to which your Honors have held, that the defense maintained in the Peake case could not apply.

The fifth assignment of errors embraces and incorporates, as assignments of error here, those which were relied upon in the Court of Appeals to reverse the decree of the Circuit Court; they are in part repetitions of those already discussed; nothing already said which applies to them will be repeated; they will be argued in the particulars as to which they have not already been treated, and the Court is asked to consider as applying to them also, so much of the argument already made as is relevant.

The first assignment was that the Circuit Court erred in overruling the exception to the master's report, which is stated as a general conclusion, sustained by the grounds set out in the special assignments following, and hence may be considered as covered by what is said of the latter.

The second assignment is the following:

Second—That from the evidence before the court, accompanying the said report, it conclusively appeared that the dredge boats, derricks, etc., and other tangible property, or property having a physical existence, purchased by the City of New Orleans from Warner Van Vorden and the Mexican Gulf & Ship Canal Company, by authentic act before G. Legardeur, Jr., notary public,

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of date June 7, 1876, were of the value of $153,750 under the appraisement made pursuant to the act of the General Assembly of Louisiana No. 16 of 1876, and that to this extent only, and to no further or larger amount, should the warrants issued under the city's purchase of June 7, 1876, be admitted as debts or liabilities of the City of New Orleans, and payable out of the fund ascertained by the Master's report; that any warrants in exeess of this amount should have been refused payment out of, or participation in, the said fund, because they were in no sense "purchase" warrants, were not given in payment of the purchase price of property, and hence, not entitled to the benefits of the decree in this cause.

It appears from the report of the city engineer that the dredge boats, or property having a physical existence, purchased by the city, were appraised at the value of $153,750 (see p. 95 of the record of Warner vs. City of New Orleans, No. 640 of the docket of this Court of its October term of 1898).

This assignment is made upon the theory that Act No. 16 of 1876 was the sole authority for the purchase made by the city on June 6th of that year; that the city was without power to purchase any property, or to make any contract pertaining to the same, which was not conferred by that statute; that its proper construction, restricts the right of the city to the purchase of the tools, implements, machines, boats and apparatus belonging to the Mississippi & Mexican Gulf Ship Canal Company and Van Norden, and used by it or him for or pertaining to the drainage work which the two had prosecuted from 1871 until 1876.

The powers conferred upon the city by Act No. 16 of 1876, were the following:

First—To transact and contract with the Canal Company and its transferee, for the purchase and settlement of all or any right, franchises, and privileges, created,

authorized, or arising, in favor of said company or its transferee, under and by virtue of Act No. 30 of the Acts of 1871.

Second—For the purchase and transfer to the city of New Orleans of all tools, implements, machines, boats, and apparatus, belonging to the said company or its transferee, and by it or him used for, or pertaining to the drainage work authorized to be done by the said Act No. 30.

The "rights, franchises and privileges," in favor of the company, created by the Act of 1871, or arising therefrom, were to dig canals and build levees in the city of New Orleans, and to charge fifty cents per square yard for each class of work. (See sections 2, 3, 4, 5 and 8 of Act No. 30 of 1871.)

By the Act of 1876, and the contract made thereunder, the city was given the power to do all canalling, dredging or other drainage work required, to be paid for by assessments upon property, or from the city treasury; the effect of this was to transfer the work of completing the drainage system from the company and Van Norden, who had been entitled, under the act of 1871, to exact payment for it at the rate of fifty cents per square yard for excavating, and fifty cents per square yard for levee building, to the city of New Orleans, with no right to make any charge for it at all; funds for its payment were to be realized out of the drainage assessments, which had already proved to be insufficient to pay the warrants of Van Norden and his assignor, or out of the general funds of the city; in view of the facts disclosed by the several records of this case in this Court, it may be said that the provision for payment out of the drainage assessments was unreal, to that extent that it can not be considered as even a pretense; it is shown that the same assessments were insufficient to pay the warrants issued to Van Norden for work done, so far as to leave unpaid an amount far exceeding a million

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and a half dollars of such warrants, up to the time of the city's purchase; the act, therefore, in point of fact, meant and intended, that the expense of the work to be done by the city should be met by her general fund, derived, of course, not from drainage assessment, but from the general taxes provided for her alimony; (see Sec. 4 of Act 16 of 1876); the act, therefore, imposed upon the city a burden, for which it can not be supposed, unless such is the direct, positive mandate of the law, that it was intended that the city should pay a consideration, certainly not the enormous sum of money which she will be required to pay on this account if the decree in this cause be sustained; the privilege of doing the work for which the company was allowed the large compensation of one dollar per square yard, became an onerous burden to the city of New Orleans, when she was required to do the same work at her own expense, without reimbursement from any source for the drainage assessment, were demonstrated, to be worthless, as a source of revenue; therefore, it is fair to say, that no Court should regard the acquisition of the company's franchise as the gain of anything possessing the smallest element of pecuniary value, for which the city was to pay a money consideration; such a conclusion would not only be repulsive to common sense, but hostile to good conscience.

But it has been argued in behalf of complainant, that not only the "franchises and privileges" of the company, were declared to be the objects of the contract which the city was authorized to make, but also its "rights," created, authorized, or arising in favor of the company, under the act of 1871, and one of its "rights" was the claim for damages which it set up against the city, by reason of delays which had occurred in the prosecution of the company's work prior to 1876, by the failure of the city to promptly furnish lines and levels for the same; such a "right," it is clear, would not be included in the descrip-

tion of things here discussed; the language used in describing them is, "all or any rights, franchises, and privileges, created by or arising from the act of 1871;" it is quite evident that the "rights" in question were the "franchises and privileges," mentioned immediately thereafter, and the terms were used, as they are in common practice, to describe the corporate grants, prerogatives, and advantages, conferred by the act of 1871; the language, "rights, privileges and franchises" denotes one thing, and not several, namely, all that the company was authorized to do under the act of 1871, and which it would have no right to do, unless bestowed by competent authority; it is true that the term "right," which is generic, is more comprehensive than "franchise" or "privilege," which are specific, and may, in a popular, and perhaps a technical sense, be classed as "rights;" but they are terms of narrower import, signifying less, than the word by which they are preceded; it is a well settled rule of statutory construction, that when specific, follow general terms, in an enumeration, the meaniug of the latter are narrowed to the limits of the former; so that it can not be considered here that the expression "rights," includes or connotes anything more, or beyond, what is declared, or expressed by words "franchises or privileges;" besides which, the claim for damages could not be a "right," until it was admitted, both as to liability and amount, by the city, or liquidated by judgment.

If it was the intention of the Legislature, to authorize the adjustment of any claims between the contracting parties, such as demands for damages, it is altogether improbable it would have conferred such power otherwise than in express terms; nothing could be more obscure than the bestowal of such authority, if it is contained at all, in the act of 1876; it must not be considered that the Legislature would have given any such power, in language

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so vague and indefinite, as to require its ascertainment by interpretation, inference, or strained construction; especially relating, as it did, to an authority which it was deemed necessary to grant by special act of the Legislature; it would be surely reasonable to expect that whatever the General Assembly really intended, would have been expressed in unmistakable terms.

Stress, however, is laid upon the claim, that the city of New Orleans, by Sec. 1 of Act 16 of 1876, was authorized not only to contract with the Canal Company and its transferee, but also to *transact*, for the purchase and settlement of any and all rights, franchises, etc.; and to the word "transact" there is sought to be given the significance of "compromise," which it is insisted is fortified by the other declaration of the section, that the city should so proceed for the "purchase and settlement," of the rights, franchises, etc., the terms "transact," and "settlement," being relied upon as covering the compromise of the claim for damages.

Neither word adds anything to the meaning of the law, more than if the word "contract" alone had been used.

The authority of the city is, to "transact and contract * * * for the purchase and settlement of all or any rights, franchises and privileges created, authorized or arising in favor of said company or said transferee, under and by virtue of Act No. 30 of the acts of 1871."

It is not all clear that the word "transact," is used in the technical sense of "compromise;" if it were so, it is quite certain that it would be followed here, as it generally is in common practice, by the words, "or compromise," so as to show the definite purpose of using it as synonymous, with the compounding of differences; it is more reasonable to assign to the word a meaning in the sense of, to "treat," or to "negotiate," with the view of agreeing upon terms in accordance with which the city was to "contract;" taking the word "transact," as apply-

ing to the word "purchase," afterwards used in the sense of an authority to "transact," for the "purchase," etc., a fair reading of the law, would be this: that the city is authorized to "treat" or "negotiate" for the purchase, etc., and taking the word "contract," as relating to the word "settlement," which subsequently occurs, in the sense of an authority to "contract," for the "settlement," etc., a fair reading of the section would be, "and to contract for the settlement," etc.; the terms "transact" and "contract," followed by those for the "purchase and settlement," would naturally be considered as referring to each other in the order named, that is "transact," to "for the purchase," and "contract," to "for the settlement," etc.

No one accustomed to, or familiar with, the mode of drafting notarial acts of compromise in Louisiana, would ever think of using the word "transact" without following it with the words "or compromise."

There is no mention of the word "damages," much less, "damages arising from or growing out of the contract of 1871."

The claim for damages was neither a franchise, nor a privilege, created or arising under and by virtue of Act No. 30 of 1871; its elements were, first, the contract created by that statute, and second, a passive violation or violations thereof by the city; it would be incorrect and misleading to describe it, in the language of the section, as a right, created or arising in favor of the company, under and by virtue of Act No. 30 of 1871; such rights as were so created, or which arose in favor of the company, were the rights to dig canals, build levees, and charge for the same at fifty cents per square yard; the damages would necessarily be extraneous to the statute, and would depend upon acts of omission or commission, outside of it, from which, of itself, and apart from the doings under it, these could be created, and from which could arise, no claim in favor

of the company; the rights created or arising from the act of 1871, spoken of by section first of the act of 1876, are those which are created by the terms of the law itself, or arise from a mere reading or consideration of its provisions, which are declared by its terms, or appear upon its face; the transaction, the contract, the purchase, and settlement, which the city was authorized to enter upon, were as to those rights which the company acquired under the statute, the moment it became a complete and perfect law, by the signature of the governor and was accepted by the company; it did not have in contemplation any rights which might thereafter arise, from the acts of the parties in executing or failing to execute the drainage contract.

The concluding provisions of Sec. 6 of Act No. 30 of 1871, by which the city is made liable for the damages resulting from the failure of the city to locate the lines of canals and levees in time to prevent delay in the prosecution of the work, could find no application until such delays were caused, and manifestly this could only be at some time in the future, and this provision, of its own force, and without application to posterior delinquencies of the city, could create no claim in favor of the company, nor could any claim arise therefrom.

The third assignment of error in the Circuit Court's decree is the same as the fourth assignment here; this has been already discussed.

The fourth assignment of error in the Circuit Court's decree, repeated here, as a subdivision of assignment fifth, is the following:

"*Fourth*—That as to the remainder of the $320,000 issued, as shown by the said act of sale from Van Norden and said company to the City of New Orleans—that is, the residue after deducting the said $153,750, the value of the dredge boats, and $20,000, in satisfaction of drainage taxes claimed to have been diverted, to-wit,

$146,250, they were issued without any warrant or authority of law, the said Act No. 16 of 1876 furnishing no authority for the same; that they represented no value received by the City of New Orleans, and were a mere gratuity; that so far as said residue of the said warrants may have been, or pretended to have been, in settlement of any claim for damages due by respondent to Warner, Van Norden or the said company, it was without warrant or authority of law, the said act of 1876 neither directing nor authorizing any settlement or compromise of any such claim; and that even were it otherwise, there was no appraisement of the said damages, which, in any event, would be a condition precedent under said act of 1876, for any settlement or adjustment thereof; that so far as the said residue of the said warrants may have been, or may have pretended to have been, in payment of the price of or equivalent for the franchises of the said company, the same was a pure fiction, and that the assumption of said franchises by respondent was not the acquisition of property, or of anything of value, but was the assumption of a burden or obligation, the franchise of the company being to dig canals and build levees, and to charge therefor at the rate of fifty cents per square yard for each class of work, while the assumption of this work by the city of New Orleans required it to expend its own means in the prosecution thereof, without the right to make any charge therefor against any person; that, in any event, no contract could have been made for the purchase of said franchise, except at a price fixed by an appraisement, under the act of 1876, prior to its purchase, and no such appraisement was made.

That the court should have refused the allowance of the said residue of warrants against the fund ascertained to be due by respondent, and should have rejected any claim against the same evidenced by war-

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rants, in excess of the said $153,750, while, as a matter of fact, the whole amount of the $320,000 of warrants issued by the city were decreed to be payable out of the said fund, save $4000 thereof, which had been paid, in which finding the court was in error.

That the act of 1876 authorized only the purchase of the dredge boats, etc., and franchises of the canal company; that any value or importance of the latter was a mere fiction; that the twenty thousand dollars issued in satisfaction of drainage taxes claimed to have been diverted was without warrant or authority of law, have been argued under the second, third and fourth assignments; the discussion of the present assignment will be confined to the effect of the absence of any appraisement of the franchises and of the claim for damages, as regards the validity of the contract as pertaining to these, and as to the right of any warrants issued therefor to share in the fund before the court."

We have seen that respondents' contention is, that the authority of the city, under the act of 1876, was not only to purchase the franchises and property of the company, but likewise to transact or compromise and settle all rights and claims at large between the parties. Should this be true, under this assignment we will endeavor to show that the contract was absolutely void, so far as concerns the purchase of the franchise, and the settlement or compromise of the claim for damages, and this by reason of the nonobservance of a condition precedent required by the act of 1876, as a prerequisite of any right of the city at all to make any contract by its authority.

Section 2 of the act of 1876 declares, that should the city deem it advisable to make the purchase and settlement authorized by section one, it should be the duty of the council to provide by ordinance, for the appointment of appraisers, to estimate the value of the rights and things to be purchased and settled for, and that the duties

and powers of said appraisers should be specially assigned in the said ordinance; there was a compliance with this provision so far as concerns the dredge boats, etc., which were appraised at $153,750; the appraiser expressly declares, after citing certain data, that he was unable to arrive at a conclusion, to make any appraisement of the mooted claim for damages; (see record of this court No. 640, October Term, 1898, pp. 95 and 97); there is no pretense even of an attempted appraisement of the franchise; the contract, so far as the value of the dredge boats was concerned, was made in accordance with the statute enabling the city to act, and in this respect the contract can not be assailed.

But in any event the contract could have no effect whatever, as concerned a purchase of the franchises of the company, nor as a compromise as a claim for damages, by reason of a failure to observe a condition precedent to the making of any contract at all, authorized by Act No. 16 of 1876.

By Sec. 2 of Act No. 16 of 1876, it was made the duty of the Council of the City, in the event it was deemed advisable to make the purchase and settlement authorized by Sec. 1, to provide by ordinance for the appointment of appraisers, to estimate the value of the things to be purchased or settled for; it must be understood, that the discharge of the duty thus imposed upon the Council, was a condition precedent to the validity of the purchase and settlement so authorized; it can not be assumed that the General Assembly would have incorporated this condition in an entire section of the law, substantive and independent of the other subject matter, if it had not deemed the requirement to be of such consequence as to make the validity of all that was subsequently done, depend upon its observance.

The appraisement was an indispensable prerequisite, to

the valid and legal purchase or settlement of any matter at all, under the contract which was authorized.

"Respecting the mode in which contracts by corporations should be made, it is important to observe that when, as is sometimes the case, the mode of contracting is specially and plainly prescribed and limited, that mode is exclusive, and must be pursued, or the contract will not bind the corporation."

1st Dillon's Municipal Corporations, Sec. 449, 4th Ed.

See note on the same, p. 512, as follows: "Speaking of this subject in the case above cited, Marshall, C. J., says, 'the act of incorporation is an enabling act; it gives them all the power they possess; it enables them to contract, and when it prescribes to them a mode of contracting, they must preserve that mode, or the instrument no more creates a contract than if the body had never been incorporated.'"

It will be conceded, that the powers of the City Council are not derived from general law; that its only power to act in any case is derived wholly from statute, and that therefore it possesses no power except such as is expressly so granted, or may be incidentally necessary to carry into execution, the power which the statute expressly gives.

It may also be laid down as a general rule, that the power given, must be exercised in the mode prescribed by the statute; hence, when the statute prescribes a particular way in which the corporation is to act, it can only act in the mode prescribed; to sanction a contrary doctrine would place corporations above the law, and would, to say the least, be fraught with dangerous consequences. If such doctrine should prevail, is there not reason to fear that corporations might soon become intolerable nuisances?

When the fair interpretation of a statute, which directs acts and proceedings to be done in a certain way, shows that the Legislature intended a compliance with such pro-

vision, to be essential to the validity of the act or proceeding, or when some antecedent and prerequisite condition must exist prior to the exercise of the power, or must be performed before certain other powers can be exercised, then the statute must be regarded as mandatory; under such conditions the corporation has no election as to how the duty shall be performed, and municipal officers have no option or authority to act differently from the mode particularly prescribed.

Turning to Section 2 of Act 16 of 1876, we find, that if it should be deemed advisable by the council to make the purchase and settlement authorized by Section 1, "*It shall be the duty* of said council of the city of New Orleans to *provide by ordinance* for the appointment of appraisers, to estimate the value of the rights or things to be purchased or settled for, and the *duties and powers of said appraisers shall be specifically assigned in said ordinance.*

A solemn, imperative, and absolute duty, could not be prescribed in more emphatic terms; so important was its careful observance in the mind of the Legislature, that it provided a mode of appointment for the appraisers, that is, by ordinance, and descended to the details thereof by specially ordaining, that it should expressly assign the duties and powers of the appraisers. It would not only do violence to the expressed will of the Legislature, but invade every reasonable presumption to suppose, that a requirement set out with such particularity, could be disregarded without working the absolute nullity of the contract, so far as made without its observance.

It is quite clear that the Legislature intended that there should be more than one appraiser, while here the estimate was made by the city engineer alone; he made no attempt to appraise the value of the franchises and privileges of the company, which are not even mentioned by name in his report; as to the claim for damages, he made

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an effort to place a value upon the same, but declared his inability to reach a result; he did appraise the dredge boats and other property of a like character having a tangible existence; so far as this, the contract may be said to have been made in accordance with the statute; but in reference to the franchises and privileges of the company and its claims for damages, the appraisement imperatively required by the law as a condition precedent not having been made, they can not be considered as forming any part of the agreement.

It is clear that the purpose of the legislature was, that the council should be furnished with a reliable estimate of the things to be sold, to be fixed by the appraisers selected in accordance with the law, so that it could be intelligently determined what price should be demanded; it was not intended that the council should make the appraisement; such power was expressly withheld from that body, and conferred upon appraisers to be selected by the city; the council had no power at all, except what was given by the statute, and it was without right to usurp a function which the statute had vested in other persons; as has been seen, the Act of 1876, in respect to appraisement, was observed as to the dredge boats, derricks, etc., alone, and wholly ignored with reference to the franchises and privileges, and demand for damages, which it is claimed were also objects of the contract.

In Addis vs. City of Pittsburgh, 85 Pa. (State), 379, it was held, that where the law requires that contracts for certain municipal work should only be made after due advertisement, and the lowest bidder, neither the municipality nor its officers could make a binding contract, unless in the prescribed manner.

In Leavenworth vs. Rankin, 2 Kansas, p. 370, a contract for grading streets was decreed void, because no petition for the work, by a majority of the resident property owners to be affected by the tax, had been presented

to the council, as required by the ordinance authorizing the contract; and if such be the law as regards a requirement imposed by the city herself, it would, for the greater reason, apply to a condition precedent to the making of a contract prescribed by the Legislature in the statute authorizing the contract to be made; the Court said, (p. 371):

"Municipal corporations are creatures of the law, and possess no powers except such as are conferred by the law. They act under prescribed rules, and must act in accordance with them. They can not in any sense be said to act as natural persons. When they undertake to make contracts, they must observe the regulations prescribed in that behalf, else there will be no contract, and no subsequent act can cure the defect."

In McCoy vs. Briant, 53 Cal. 249, the city was authorized to issue bonds at such time or times as its board of trustees might by resolution direct; there was a bond issue, but directed by no resolution, as was required; the bonds were held void; the Court said, *arguendo:*

"It is a general and fundamental principle of law that *all* persons contracting with a municipal corporation must, *at their peril inquire into the power* of the corporation, or its officers to make the contract; and a contract beyond the scope of the corporate power is void, although it be under the seal of the corporation." (Dillon on Municipal Corporations, Sec. 372.) And where the *mode* of contracting "is specially and plainly prescribed and limited, that mode is exclusive and must be pursued, or the contract will not bind the corporation." (Dillon on Municipal Corporations, Sec. 373.) In Argenti vs. San Francisco, 16 Cal. 283, Mr. Justice Field says: "A municipal corporation can only act in the cases and in the *mode* prescribed by its charter." In McCracken vs. San Francisco, 16 Cal. 620, the same learned judge, in delivering the opinion of the court, says the common council were

the mere agents of the corporation, and possessed only such powers as were specially delegated to them by the charter, and when that instrument granted a power with a specific designation as to the mode in which it should be used, the mode was restrictive—no other mode could be followed. In Zottman vs. San Francisco, 20 Cal. 102, the Court says: "The rule is general, and applies to the corporate authorities of all municipal bodies—when the mode in which their power on any given subject can be exercised is prescribed by their charter, the mode must be followed. The mode in such cases constitutes the measure of the power." The same proposition was affirmed in Murphy vs. Napa County, 20 Cal. 503; French vs. Techemacher, 24 Cal. 550; Herzo vs. San Francisco, 33 Cal. 145; People vs. Tomlinson, 35 Cal. 507, and in later cases.

In Town of Durango vs. Pennington, 8 Colorado, 259, speaking of a municipal contract for grading streets, it was declared:

"We understand the law to be well settled, that when the mode of proceedings in respect to transactions of this nature is prescribed by law, or in the charter of a municipal corporation, such mode must be strictly pursued by the corporation, in relation to the awarding and making of contracts, or no liability is thereby incurred. The party dealing with a municipal body is bound to see to it that all the mandatory provisions of the law are complied with, and if he neglects such precaution, he becomes a mere volunteer, and must suffer the consequences." Citing authorities.

In Worthington vs. Covington, 82 Ky., 265, the charter of the defendant required that all contracts for street improvements should be referred to a committee of the city council; such a contract was made without such reference; it was held to be nonenforceable: the court declared that the council had not taken the steps which

gave it the right to contract, or to create a lien upon the property of the appellant, for the cost of the improvement, and which action was a condition precedent to the exercise of its power to do so, or to make the assessment.

The analogy between this case and the one at bar is striking; the requirement of the reference to a special committee of the ordinance in the Kentucky case, is precisely the same in character as the requisite here, of an appraisement of the property which was to be the subject of the contract authorized by the act of 1876; this latter, as is declared of the reference to a committee, in the cited case, was a necessary step to give the city any right to contract at all, and was a condition precedent for the exercise of whatever power the act of 1876 granted.

We have seen that the appraiser failed and declined to place any valuation upon the claim for damages. (See Record 640, p. 96). And none was made of the franchise.

It appears (see Record 640, p. 97), that the damages claimed by the company were for 190,000 cubic yards, which were not excavated by the dredge boats, by reason of the prevention by the city authorities of the city surveyor, furnishing the necessary lines and levels; but the appraiser finds that of the five boats claimed to have been delayed, only three were actually so delayed, boat number one for five and a half months, boat number four for the same period, and the "clam shell" for four months, all of which the appraiser estimates, would have excavated, during the period, 149,445 yards; this would have been worth, at fifty cents per square yard, the charge for this class of work fixed by Section 9 of Act 30 of 1871, $74,722.50, instead of $146,250, the difference, considering the franchise as for value, between $153,750 (see Record 640, p. 95), the value of the actual property having a physical existence, such as boats, derricks, etc.,

and the $300,000 in warrants paid by the act of purchase and the claim for damages, or $71,527.50 in excess of the figure at which the surveyor estimated the damages, but did not have sufficient confidence in his estimate to make it a valuation and appraisement, as he was requested to do; so that if even the damages were properly a part of the amount to be paid by the city, they have been vastly overpaid, so far as any data is given by the report of the appraiser.

But in any event, the appraiser, whose appointment is expressly directed by section 2 of the Act of 1876, placed no value at all upon the claim for damages, and none could be given it by any one else, nor could it form any part of the things for which the price was to be paid unless previously fixed by the appraiser.

The fifth subdivision of the fifth assignment of errors, being the fifth relied upon in the Court of Appeals, points out the mode in which the $153,750 of warrants entitled to be paid out of the fund in court can be separated and distinguished from the remainder, which are attributable in gross to the price paid for the corporate franchise, the amount which may be referred to the settlement of the claim for damages, and $20,000 issued in reimbursement of drainage taxes diverted; it appears that the warrants issued under the act of June 7, 1876, were numbered 313 to 402, consecutively; (see record brought up in Court of Appeals, pp. 53-55); that warrants 393 to 402 were issued in payment of the $20,000 in compromise of drainage taxes diverted; (see same record, p. 52); of these it appears that warrants 400 and 401 have been paid; that warrant 402 is included in the claim of Wilder & Co., upon which judgment at law was obtained in the Circuit Court May 28, 1898; (see same record, p. 45); therefore, of the warrants presented for payment, warrants 393 to 399, inclusive, and 402, are susceptible of precise identification; it has been argued that the judgment at law in

favor of Wilder & Co. on warrant 402 is of no more significance than the warrant itself, the judgment being in the same terms as the warrant—that is to say, payable out of drainage taxes; the identity of the warrants is not lost, and even if it were, the judgment is obligatory in like same tenor and effect as the warrant is, and no more.

As regards the other warrants, taking them in their numerical order, when they reach an amount of $153,750, all bearing subsequent numbers are stricken with invalidity; the reason why their numerical order should prevail is that it must be presumed that the parties proceeded first to do what they were authorized to do, and not have begun with what they were without right to do; that is to say, that warrants must be presumed to have been first issued in payment of the price or value of the dredge boats, derricks, etc., and afterwards on account of the corporate franchises, claim for damages, and reimbursement of diverted taxes. See list of warrants, record from Court of Appeals, pp. 53–55

The sixth and seventh assignments of error are summaries of those already discussed; it is not considered necessary to devote any attention to them, beyond what is involved in what we have already said.

Respectfully submitted,

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May, 1900.